

# Creating an Environment of Expectations



## **LEGISLATIVE BRIEFING**

**Hawaii State House of  
Representatives  
Committee on Labor &  
Public Employment**

June 28, 2005 9:00 a.m.

State Capitol, Rm. 309





# Legislative Briefing

Hawaii State House of Representatives  
Committee on Labor and Public Employment  
State Capitol Room 309 - June 28, 2005, 9:00 a.m.

## 2005 Administrative Rules for Hawaii's Workers' Compensation Reform

Nelson Befitel, Director

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# AGENDA

- Background.
  - Implementing the New Administrative Rules.
- Overview of the Major Changes.
  - Improved Hearings Process.
  - Use of Evidence-Based Medicine and Treatment Guidelines.
- How the New Rules Will Improve Hawaii's Work Comp System.
  - Benefit Injured Workers.
  - Ensure Medical Care is Based on the Best Practices of Medicine.
  - Bring Efficiency and Cost Savings.

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2

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# The Administrative Rules . . . How were they implemented

- DLIR proposed rules to improve three major areas.
  1. Hearings and Claims Resolution Process;
  2. Medical care and treatment of injured workers; and
  3. Vocational rehabilitation of injured workers.

*HRS Chapter 91*
- Public Hearing was held on Feb. 7, 2005.
  - Received approximately 230 testimonies.
  - Majority supported the rules on the hearings process and medical treatment of injured workers.
  - Most of the oppositions pertained to vocational rehabilitation rules.

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3

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## The Administrative Rules . . . How were they implemented



- On April 25 2005, DLIR submitted: [Recommendation to the Governor on Workers' Compensation Reform 2005.](#)
  - Comprehensive 100 + page report, posted on [hawaii.gov/labor](http://hawaii.gov/labor)
  - Recommend adoption of Rules on New Hearings Process and Medical Guidelines.
  - But not adopt proposed rules on vocational rehabilitation rules because of concerns raised at the public hearing.
  - Gov. Lingle signed the administrative rules – effective May 13, 2005.

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## Implementing the New Administrative Rules . . .



- All work comp hearings officers attended National Judicial College Training on June 13 – 16, 2005.
- DLIR held Educational Seminars for Workers' Comp Community on June 23, 2005.
- Continue Outreach and Educational Initiatives by holding more seminars and workshops.
- Publish informative "how-to" handbooks for employees, employers, providers, etc.
- Provide up-to-date information on [hawaii.gov/labor](http://hawaii.gov/labor)

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## [hawaii.gov/labor](http://hawaii.gov/labor)




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## Goals of Workers' Comp



- Ensure injured workers receive **quality medical care** that is necessary and reasonable.
- Ensure injured workers **promptly receive disability benefits** and necessary vocational training that they are entitled to.
- Ensure costs and insurance **premiums are affordable** for businesses.
  - ☐ Should not serve as a barrier to doing business in Hawaii.

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7

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## Improving Hawaii's Workers' Comp System



### Hearings and Resolution Process

- Modernized hearings process that brings efficiency, transparency, predictability, and accountability.
- Hearings scheduled and disputes resolved in a fair and more timely manner.
- Disputes resolved by an impartial hearings officer.
- **DCD Hearings Officer**
  - ☐ Not advocate for worker or employer, but advocate of the law and steward of the work comp system.
  - ☐ Judicially trained by the National Judicial College.
  - ☐ Subject to review to ensure consistency and fairness.

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8

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## Improving Hawaii's Workers' Comp System



### Medical Care and Treatment of Injured Workers

- Diagnosis and treatment. Based on the most current **"best practices" of medicine** by requiring the use of ODG Treatment Guidelines, which are evidence based.
- **Rules allow flexibility.** May treat more expansively than what the ODG guidelines specify if:
  - ☐ Specific case requires such type of treatment; and
  - ☐ There is objective justification based on "evidence-based medicine" to support treatment.

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9

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***“Progress is impossible without change, and those who cannot change their minds cannot change anything.”***

*-- Albert Einstein*



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10

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**The Improved Claims Hearings and Resolution Process**

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11

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**The New Administrative Rules**

- We now have basic rules on:**
  - The “discovery” or exchange of evidence in preparation for a hearing.
  - The scheduling of hearings.
  - The expectation and conduct of the parties during the hearings process.
  - The alternative dispute resolution process.

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12

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### The New Administrative Rules



- Encourage parties to resolve their disputes without a hearing.
- Eliminate appearance of favoritism when it comes to scheduling.
- Ensure hearings are scheduled and held in an orderly and efficient manner.
- Result in more cases being resolved in a timelier manner.
- Eliminate “unwritten rules.”

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13

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### Discovery Rules



- ☐ “Interrogatories” limited to 20 questions.
- ☐ Depositions allowed only under certain circumstances:
  - Responses to interrogatories are insufficient; or
  - All parties agree to deposition.
- ☐ Additional Discovery
  - Only if “reasonable and necessary”; or
  - Upon agreement of the parties.

[HAR Section 12-10-65](#)

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14

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### Requesting a Hearing



- File only if unable to resolve dispute.
- Written requests must contain certain information to prepare for hearing:
  - ☐ Issue(s) to be resolved;
  - ☐ Names of all witnesses; and
  - ☐ Notice to opposing party that they have 20 days to file a response.
    - ✓ Use Department’s form (WC 77 Request for Hearing).
- Request for hearing must be sent by certified mail.
  - Ensures other party (especially the unrepresented worker) receives notice of application of hearing.

[HAR Section 12-10-72.1](#)

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15

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## Response to Hearing Application



- Must file response within 20 days after receiving opposing party's request for hearing.
- Must submit the following information to prepare for hearing:
  - ☐ Response to statement of the issue(s); and
  - ☐ Names of witnesses;  
✓ Use Department's form (WC 77 Response for Hearing).

*HAR Section 12-10-72.1*

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## Scheduling the Hearing



*All hearings will be scheduled within **80 days** from the Request for Hearing.*

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## Expedited Hearings



- Claimant (employee) may file for an expedited hearing in certain situations:
  - ☐ Employer (insurance carrier) failed to file a response to claimant's application for hearing; and
  - ☐ Claimant will "suffer severe economic hardship or severe physical or mental harm" if an expedited hearing is not held to determine merit of the case.

*HAR Section 12-10-72.1*

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## Exchange of Documents & Witnesses



- **Exchange of Documents.** All documents that you want the hearings officer to consider must be provided to the Director and opposing party **15 days** before the hearing.

### This includes:

- ✓ Medical and hospital reports.
- ✓ IME report.
- ✓ Vocational reports.
- ✓ Records kept by employer.
- ✓ Deposition transcript.
- ✓ Written testimonies.

- Absent a showing of "good cause," documents not exchanged in accordance with this rule, will not be considered.

[HAR Section 12-10-72.1](#)

19

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## Exchange of Documents & Witnesses



### Purpose of Rule:

- **Facilitate Settlement.** Encourage resolution by prompting parties to think about their case.
- **Ensure parties receive fair notice and opportunity to be heard.**
- **Expedite Hearing.** Allow the hearings officer and the parties sufficient time to prepare for the hearing.
  - Help define the parties' position and their goals.
  - Isolate issues and relevant documents and testimonies for hearing.

20

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## Exchange of Documents & Witnesses



- **Naming Witnesses.** Only witnesses named on Application for Hearing and Response will be allowed to testify at hearing.

- ✓ Update/amend Application and Response as necessary.

- **Exceptions.** Unnamed witnesses may testify under limited circumstances:

- ✓ Rebuttal Witness; or
- ✓ "Good cause" for failing to name witness.
  - *Must establish compelling reason for failure to name witness.*

21

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# The Hearing Date!

*The Hearing Date is a Firm Date; it is not a suggested date.*

A continuance generally delays the resolution of the claim at the expense of injured workers and employers.

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## Continuance of Hearing . . . Rarely Granted

- Unless you have reached a settlement, be prepared to go to hearing.
- Continuance will be granted only when there is “good cause” to continue. HAR Sec 12-10-72.1 provides certain situations that would constitute “good cause.”

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## Continuance of Hearing . . . Rarely Granted

- Absent additional grounds, the following generally do not constitute “good cause” :
  - Not prepared for the hearing.
  - Did not complete investigation and/or discovery.
  - Did not obtain an IME report.
  - Did not obtain witnesses’ statements.
  - Witness is unavailable for hearing.
  - An agreement of the parties to continue case.
- Remember, the parties will generally have at least 80 days to prepare for the hearing.

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## The Workers' Comp Hearing



- **No Ex Parte Communication.** Hearings officer will not communicate with any party outside of the proceeding on matters relating to the case.
  - **Exceptions.** Scheduling or other purely administrative matters. Employer (Insurance Carrier) waives appearance for particular hearing (e.g., disfigurement determination).
- **All Hearings Will be Recorded.**
  - Ensure full and complete record of the hearing.
  - Allow Department to review the hearing and decision to ensure consistency, and proper application of the law.
  - **Efficiency.** Hearings officers are no longer required to handwrite or type the complete record of proceedings. Allow hearings officer to issue concise decision and order.

25

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## The Hearings Officer's Decision



- **New format** – Addresses issues that are relevant to the case in a concise and easier-to-read format.
  - I. Introduction (identification of parties and hearings officer, date of hearing)
  - II. Parties' Position
  - III. Issues
  - IV. Findings of Fact
  - V. Principles of Law
  - VI. Conclusion of Law
  - VII. Decision and Order
- **Goal** – Issue decisions in timelier manner.

26

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## Alternative Dispute Resolution



- Parties may obtain private third party to resolve dispute using two methods:
  - **Mediator.** The third party serves as a mediator (settlement-officer) to assist the parties in resolving their disputes.
  - **Private Referee.** The third party serves as a hearings officer to resolve dispute.

27

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## Alternative Dispute Resolution



### • Basic Requirements:

- ☐ Agreement must be in writing, executed by all parties after the work comp claim.
  - Standard arbitration clauses signed before injury (e.g., employment handbook/contract, employment application, etc.) are invalid.
- ☐ Unless agreed by the parties, all costs are equally shared.
  - Employer may pay for the entire costs.
- ☐ Mediator/Referee must submit recommended decision to the Director within 60 days of the hearing.
- ☐ Parties may agree that the “decision” will be binding.

28

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## Alternative Dispute Resolution



- The recommended decision will be approved unless contrary to Chapter 386. (Deference will generally be given to the private referee's decision)
- If approved, the referee's decision will have the same effect as a Director's decision issued under Chapter 386.
- If the referee's decision is not modified or vacated by the Director, and the parties agreed that no appeal can be taken, the decision is binding on the parties.

29

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## Summary

### The Improved Hearings Process



*These administrative rules modernize the hearings process to ensure efficiency, transparency, predictability, and accountability.*

*The interest of keeping the hearings lax and “informal” must be balanced with keeping the process fair, equitable and efficient. These proposed rules strike that balance.*

30

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## “Evidence-Based Medicine” and Medical Guidelines

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31

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### What is “Evidence-Based Medicine”?

**Evidence-Based Medicine** means that medical decisions are based on what the medical and scientific literature show are effective treatment for a particular health condition.

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32

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### What are “Evidence-Based Guidelines”?

- **Evidence-Based Guidelines** refer to treatment guidelines that are supported by scientific medical studies which show a clear link between the symptoms and diagnosis or treatment and improvement among a group of people studied over time.
- Recommendations of treatments that have proven to produce the best outcomes.

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33

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## "Best Evidence"?



- Start with scientific medical study on the effectiveness of treatment for a certain medical condition.
- Study is published in peer-reviewed medical journals [E.g., JAMA (Journal of American Medical. Assoc.)]
- It is subject to critical evaluation by the medical community based on available scientific evidence.
- Therefore, best evidence are not based on clinical opinions or anecdotal reports, but based on scientific evidence.

34

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## ODG is Evidence Based Guidelines



35

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## How are Guidelines used?



- To identify effective courses of treatment.
- To facilitate communication when parties disagree regarding an effective treatment plan (e.g., to ensure all parties are on the same page).
- As a baseline for decision making.

36

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## This is NOT Cookbook Medicine



- Guidelines do not take the place of clinical judgments.
- Many treatments and therapies work, therefore different treatment are offered as options.
  - For example, manipulation (chiropractic), physical therapy, massage, are recommended as options to treat lower back strain.
- Requires clinical expertise and judgment in assessing medical information and administering most effective treatment.

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37

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## What benefits do medical guidelines provide?



### ☐ In General

- Reduce ineffective and unnecessary treatments resulting in savings to workers' comp system.

### ☐ Medical Providers

- Assist in making the right decisions in providing appropriate and necessary care.
- Reduce paperwork. No longer required to submit treatment plan after every 120 days.
- Assure reimbursements for treatments.

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38

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## What benefits do medical guidelines provide?



### ☐ Case Managers

- Provide baseline on what is appropriate and necessary care for particular injury (make sure everyone is on the same page).

### ☐ Hearings Officers and Judges

- Ensure decisions on treatment and care are based on scientific support and objective findings. Not on anecdotal basis or opinions with no support.

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39

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## Who benefits the most?



### ❑ Injured Workers

- Ensures medical treatment decisions are based on what has been proven to provide the best outcomes.
- Allows medical providers to treat within accepted protocols without waiting for approval.
- Reduces conflict between all parties for faster access to needed care.
- New rules provide for swift resolution when an alternative treatment is recommended and supported by medical evidence.

40

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## Does the adoption of evidence-based guidelines in Hawaii make sense?



- Ensure injured workers are treated in a manner that has proven to provide the best outcomes.
- Reduce unnecessary treatments that have been proven harmful to patients.
- Reduce cost through effective decisions and treatments.
- Create a framework for collaboration. All parties now have the same starting point in determining appropriate care.
- Reduce litigation regarding medical care and facilitates faster resolution.

41

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## New Administrative Rules on medical treatment



- Frequency/extent of treatment in accordance with ODG Treatment Guidelines.
- In addition, the Rules reference Chapters 1-7 of the American College of Occupational and Environmental Medicine, Occupational Practice Guidelines, as an expression of disability management philosophy. (ACOEM)
- The two do not overlap. They work hand-in-hand.

42

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### Overview: ACOEM Chapter 1-7



- ACOEM's first seven chapters are not treatment guidelines.
- They do not provide specific recommendations for the treatment of occupational injuries and disabilities.
- They express the general philosophy on the practice of occupational medicine and treatment of occupational disabilities.

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### Overview: ODG Treatment Guidelines



- Focuses on treatment, does not cover Ch. 1-7 of ACOEM Guidelines.
- Provides specific recommendations for treatments of most occupational injuries.
- Published by the Work Loss Data Institute. Independent organization (not representative of just one single specialty society).
- Web version is continuously updated with the latest medical findings.

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### Overview: ODG Treatment Guidelines



- Approved in Nat'l Guidelines Clearinghouse by Federal Agency of Healthcare Research & Quality.
  - Only evidence-based guidelines designed for workers' comp approved by the federal government.
- Adopted in Ohio, North Dakota, Florida, and Michigan.
- Adopted in the Canadian provinces of British Columbia and Ontario.
- Texas' current proposed rules are to adopt ODG in similar manner as Hawaii.
- Being used/accepted in California.

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## ODG Treatment – 3 Sections



1. **Treatment Protocol.**
  - Provides the ideal or recommended treatment plan for particular injury.
2. **Codes for Automated Approval.**
  - Allows employer/insurance carrier to automatically reimburse treatments up until “maximum occurrences” that are supported by medical evidence
3. **Procedure Summary.**
  - Lists all potential therapies, many of which are recommended as options.
  - Provider entitled to reimbursements if treatment is in accordance with treatment recommendations.

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46

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## Hawaii Admin. Rules Allow Flexibility



- Physicians may treat more expansively or differently than what is prescribed by the ODG.
- Must submit alternative treatment plan to substantiate treatment.

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47

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## Submitting An Alternative Treatment Plan



- **Technical Requirements.** HAR Section 12-15-32(b) provides what the proposed plan must contain in order for it to be approved.
- **Evidence-Based Medicine.** One of the factors we will consider in determining whether an “alternative” treatment plan should be approved is whether it is based on “evidence-based medicine”.

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48

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What facts will be considered in determining whether the “evidence-based medicine” requirement is met?



- ☐ Whether the proposed treatment plan is necessary and appropriate to cure and relieve the claimant from the workplace injury.
- ☐ Whether the proposed treatment plan has been adequately established to cure and relieve the claimant from the workplace injury.
- ☐ Whether the proposed treatment plan has been subjected to peer review and publication.
- ☐ The degree of community and or national acceptance of the treatment plan.

49

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### The Alternative Treatment Plan



The physician must establish:

- ☐ The treatment is **necessary**.
- ☐ It is **likely** to be **effective**.
- ☐ It has been **proven** to be **effective**.
- ☐ It has been **accepted** by the **medical community**.

50

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### Resolving Disputes of Alternative Treatment Plans



- The parties are encouraged to resolve their dispute regarding any treatment plan.
- If the parties are unable to resolve their disputes, either party may request a hearing under HAR Section 12-15-32.
- If appropriate, a decision on the record may be issued without a hearing (e.g., there are no facts in dispute).

51

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## Summary

### Rules on Evidenced-Based Medicine and Treatment Guidelines

*These reform rules benefit both employees and employers. Hawaii's injured workers will be treated based on the most current medical "best practices," so they can return to work as soon as they are able, which will result in cost savings to employers.*

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52

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## Efficiency, Effectiveness and Cost Savings

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2005 Administrative Rules for Hawaii's Workers' Compensation Reform

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53

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## Potential Cost Savings

*The New Rules create an environment for improved efficiency and effectiveness of Hawaii's work comp system, which will result in cost savings to employers.*

*However, these cost savings will be realized only if the rules are administered properly and the parties act accordingly to the rules.*

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54

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### Potential Cost Savings

#### The Claims Hearings and Resolution Process

- Encourages facilitation of disputes without hearings.
- Resolves disputes in a more timely manner.
- Ensures employee “return to work” in a timely manner.
- Reduces costs associated with administrative “friction” (e.g., litigation costs).

55

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### Potential Cost Savings

#### Evidence-Based Guidelines

- Reduce unnecessary and excessive treatments or “over-utilization”.
- National and individual state studies found that workers’ compensation pays 33% or more than “group prepaid health care” to treat the same kind of injuries. Much of this is attributed to “over-utilization”.

56

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### Is there over utilization in Hawaii’s Work Comp System?

- Under the old administrative rules, medical providers were automatically allowed 15 treatments within the first 60 days.
  - This is an arbitrary number without any medical rational.
  - Encourages providers to excessively treat injured workers.

57

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## Is there over utilization in Hawaii's Work Comp System?



- Under the old rules, providers were required to submit a treatment plan after every 120 days.
- However, they were not required to justify their treatment plans with objective medical findings. Therefore, there was little assurance the treatment plan is effective in providing the best outcomes.

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58

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## No treatment Guidelines Result in "over utilization"



### Example - Case History/Analysis

By Stephen Demeter, M.D., and Robert Sussman, M.D.

Forty-eight year old man injured his shoulder when he fell off the ladder.



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59

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## No treatment Guidelines Result in "over utilization"



### Example - Case History/Analysis

	Old System (No guidelines)	ODG MODEL
Time off work	<b>60 weeks</b>	26 weeks
Return to work (light duty)	<b>Unknown</b>	26 weeks
Return to normal job	<b>NO</b>	Possible

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60

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## No treatment Guidelines Result in “over utilization”



Example - Case History/Analysis

	Old System (No guidelines)	ODG MODEL
Massage Therapy Sessions	24	0 (not recommended for shoulder injury)
Cortisone Injections	6	3 (excessive injections may be harmful)
Others	FCE, IME, VOC REHAB EVAL.	None
X- Rays	2	1
MRI	1	1

61

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## No treatment Guidelines Result in “over utilization”



Example - Case History/Analysis

	Old System (No guidelines)	ODG MODEL
Primary Care Physician (PCP) Visits	9	4+
Physical Therapy Sessions	108	46
Acupuncture Sessions	24	18 max
Surgery	No, (Too late, too little).	Yes

62

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### Summary of Case

#### •Over utilization results in excessive costs



#### Treatments beyond ODG recommendations

- Total time off from work - 8 months extra
- Total Extra Costs Include:
  - ☐ PCP – 2 visits
  - ☐ Orthopedist – 3 visits
  - ☐ Acupuncture – 3-15 visits
  - ☐ Massage Therapy – 24 visits
  - ☐ Physical Therapy – 68 visits
  - ☐ Intra-articular cortisone injections – 3
- Treatments provided without any scientific validity and, as seen in this case, were of no value.

63

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## Over utilization delays return to work



- National studies indicate that over utilization occurs in Hawaii, resulting in employees staying out of work longer.

U.S. Average	Hawaii Average
30.6% of work comp cases involve lost time.	52.8% of work comp cases involve lost time.
14.6% of claims are awarded temporary total disability benefits.	36.8% of claims are awarded temporary total disability benefits.

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64

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## Evidence-Based Guidelines will facilitate "return to work"



- Hawaii is one of the worst in the nation in promptly returning "injured workers back to work".
- 22.6% of our injured workers stay out of work more than 30 days. For each workers' comp case that exceeds 30 days of lost time, on an average, cost employers \$50,000.
- Evidence-based guidelines help ensure that injured workers are treated in a manner that have been proven to promptly return injured workers back to work.
- Employee Benefits. Reduce the economic impact of the work-related injury.
- Employer Benefits. Reduce costs borne by employers.

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65

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## Summary Cost Savings



*The New Rules provide a common sense approach to improving Hawaii's workers' compensation system. They do not in anyway deprive benefits to injured workers and offer a realistic chance to provide cost savings to Hawaii's employers.*

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66

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## Conclusion



***We must move past the hyperbole and accusations that "management wants to take away from labor," and that "labor is always finding ways to abuse and take advantage of management."***

***Our jobs as stewards of the system is to make the necessary changes that will protect the interest of the owners of the system – the employees and employers – even if it means changing the status quo and making several interest groups uncomfortable.***

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67

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## THANK YOU FOR YOUR ATTENTION

Nelson Befitel, Director



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68

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